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Stealing Judicial Review

House bill stripping federal courts of jurisdiction over gay marriage harms Constitution.

By John Conyers Jr.

Imagine if in the early 1950s a conservative Congress had succeeded in stripping the federal courts of jurisdiction to hear segregation cases. The Supreme Court would never have issued its historic *Brown v. Board of Education* decision declaring that separate but equal was not permitted in the field of education.

Alternatively, consider the implications if a more-liberal Congress opted to strip the federal courts of jurisdiction to hear any Second Amendment cases. How would my friends on the right like it if the California or Massachusetts Supreme Court was the final arbiter of the meaning of the right to bear arms? Would they think it fair that a single class of citizens—gun holders—was excluded from appeals to our federal judicial system?

In the more than 200 years that have passed since *Marbury v. Madison* was issued, judicial review has served as the touchstone of our constitutional system and our democracy. Since Chief Justice John Marshall's now-famous pronouncement in *Marbury* that "it is emphatically the province and duty of the judicial department to say what the law is," Congress wisely has avoided challenging judicial review out of regard for the constitutional principle of separation of powers.

Yet bringing such a challenge is precisely what the House of Representatives did last month, when it passed H.R. 3313, the Marriage Protection Act of 2004, introduced by Rep. John Hostettler (R-Ind.). If H.R. 3313 is passed by the Senate and signed by the president, it would constitute the first and only time that Congress has enacted legislation totally eliminating any federal court from considering federal legislation.

In this case, the legislation barred from judicial review is the provision in the Defense of Marriage Act that provides that states need not give full faith and credit to same-sex marriages authorized in other states.

The operative language of H.R. 3313 constitutes but a single sentence. It provides: "No court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C [the Defense of Marriage Act] or this section."

As such, the legislation effectively precludes any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to the validity of the Defense of Marriage Act. Instead, the bill relegates to state courts the review of any challenges to the Defense of Marriage Act or H.R. 3313.

UNEQUAL PROTECTION

At a time when not a single federal court has issued an opinion concerning the Defense of Marriage Act, let along striking it down, it is inexcusable for Congress to attack the federal judiciary to score political points.

It matters little to House Republicans that the court-stripping bill is inconsistent with long-standing constitutional principles concerning separation of powers and equal protection.

Article III of the Constitution vests in the courts the nation's judicial power, which extends to all cases arising under the Constitution and the laws of the United States. For Congress to foreclose judicial review of an important constitutional issue usurps the power of the third branch, undermines the separation of powers, and jeopardizes the necessary checks and balances of our constitutional system.

It also creates equal protection problems. If equal protection means anything, it's that our government cannot target a specific group of individuals for exclusion from the legal protections enjoyed by other citizens without at least a "rational basis."

The critical case in this regard is *Romer v. Evans,* a 1996 Supreme Court decision invalidating a Colorado law that would have barred the state or any political subdivision from enacting legislation to protect gay and lesbian citizens from discrimination. *Romer* held, in a 6-3 decision written by Justice Anthony Kennedy, that it was unacceptable for the state of Colorado simply to exclude a class of individuals from legal protections. The Court wrote, "A law declaring that in general it shall be more

difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of laws in the most literal sense."

These same equal protection concerns will no doubt invalidate H.R. 3313 should it pass into law. The record for this legislation is replete with animosity toward gays and lesbians and distrust of federal judges. If imposing a barrier to legislative action was unconstitutional in *Romer,* an analogous barrier against judicial action, particularly when it is motivated by animus, also must be problematic.

50 STATES, 50 INTERPRETATIONS

In addition to the constitutional deficiencies, the bill's proponents are also oblivious to the dangerous policy implications of the court-stripping bill. The concept of legal uniformity advocated by founding father Alexander Hamilton in *Federalist No. 80* would be thrown out the window. With no appeal possible to the Supreme Court, we could easily end up with numerous conflicting legal interpretations of the Defense of Marriage Act by state courts. Ultimately, constitutional rights would be a function of geography, rather than the justness of one's cause.

It is no wonder that when court-stripping legislation was proposed in the 1970s and 1980s as a way of preventing challenges to school prayer, of precluding review of laws outlawing abortion, and of ensuring that busing could not be used to integrate schools, even many conservatives found the proposals to be repugnant. Then-Yale Law School professor Robert Bork wrote of the bills, "you'd have 50 different constitutions running around out there, and I'm not sure even conservatives would like the results." Speaking on the Senate floor in opposition to these same efforts, the late Sen. Barry Goldwater stated that the "frontal assault on the independence of the federal courts is a dangerous blow to the foundations of a free society" and warned "there is no clear or coherent standard to define why we shall control the Court in one area but not another."

Today, the stakes are no less significant than they were in the 1970s and the 1980s. As emotionally charged and politicized as the issue of same sex marriage has become, we should not use that controversy to damage permanently the courts, the Constitution, and the Congress. At a time when it is more important than ever that our nation stand out as a beacon of freedom, we must not countenance a bill that undermines the very protector of those freedoms—our independent federal judiciary.

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